

BEFORE THE

# Federal Communications Commission

WASHINGTON, D. C. 20554

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In the Matter of )

Implementation of Section 309(j) )  
of the Communications Act )  
Competitive Bidding )

PP Docket No. 93-253

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To: The Commission

NOV 30 1993

REPLY COMMENTS OF  
THE UNIVERSITY OF TEXAS SYSTEM

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

The University of Texas System ("UT-System"), by its attorneys, hereby submits its reply comments in the captioned rule making proceeding. Consistent with concerns voiced by commenters representing the small business sector, UT-System urges the Commission to accommodate the needs of prospective licensees whose lack of buying power, in the coming world of auctions, will be a significant impediment to their participation in the licensing process.

The public interest in the fair and efficient distribution of FCC licenses requires that entities at risk of losing ground in the transition to auctions be countenanced fairly under the new rules. No category of spectrum users stands to lose more under the new order than do educators, whose ability to keep pace with technological advancement is absolutely critical to their educational mission. At the same time, it is difficult to conceive of a group of licensees who make a greater contribution to society and to the public good. For this reason, it is

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imperative that the Commission intelligently assess the impact of the auction rules on educators and take steps to ensure that educators' spectrum requirements will continue to be met.

The specific concern of UT-System in this proceeding relates to the university's planned use of spectrum authorized in the new Local Multipoint Distribution Service (27.5 - 29.5 GHz). In comments submitted in CC Docket No. 92-297 -- the proceeding to establish rules governing that service -- UT-System urged the Commission to designate a band of the LMDS spectrum for non-commercial use. UT-System was joined in its comments by a chorus of large university systems including the University of Colorado, the University of California, and the University of Wisconsin, among others. Suite 12 Group, the proponent of the rule making, also endorsed this concept.

The LMDS rule making proceeding is still pending and it is unknown at this juncture whether the Commission will reserve any LMDS spectrum for educational users. In the event that spectrum is set aside ultimately for this purpose, we assume that educational applicants for reserved-spectrum LMDS licenses will not be subject to the competitive bidding process. For, LMDS educational applicants would then stand in precisely the same position as Instructional Television Fixed Service applicants, whom Congress expressly exempted from the auctions process. Invoking the Conference Report accompanying the auctions legislation, the Commission declared in the NPRM that Part 74 educational entities applying for ITFS licenses are "not to be

subject to competitive bidding even if ITFS licensees receive payments from [NMDS] licensees for the use of ITFS spectrum." *NPRM* at n. 5. Accordingly, should a portion of the LMDS spectrum be set aside for educational use, the exemption of ITFS users from auctions would dictate the same exemption for non-commercial LMDS applicants.

Even if the Commission does not establish an educational set-aside in the LMDS proceeding, both the plain intent of Congress and the FCC's own gloss on the matter in the *NPRM* make clear that educational entities should be exempted from the competitive bidding process so long as the spectrum is to be used for educational purposes. Thus, the formula set forth in the *NPRM* to determine when a particular class of licenses should or should not be auctioned identifies as a "major criterion for competitive bidding" that "the licensee have paying subscribers." *NPRM* at ¶23. Educational institutions, of course, do not typically have commercial subscribers; their users are students, faculty or other university personnel using the communications facilities for internal purposes.

Correlatively, the *NPRM* echoes the Conference Report's exclusion of "private services" from auctions. *NPRM* at ¶24. The use of LMDS spectrum contemplated by UT-System and other educational institutions is a quintessential "private service." Paying subscribers would not ordinarily be in place and the licenses would be used, in the main, to satisfy internal

communications needs. See Comments of UT-System in CC Docket No. 92-297 at 1. Likewise, there can be no dispute that educators would satisfy the "principal use" requirement, identified in the statute as another variable in the determination whether competitive bidding applies. *NPRM* at ¶30.

Finally, as a conceptual matter, the rationale for exempting institutions which would use a license for educational purposes is self-evident. Educational institutions do not have a commercial mission. Thus, the economic theory which is the predicate for the proposition that auctions will promote the public interest cannot be applied rationally to educational institutions.

In this connection, the Commission's statement at Footnote 148 of the *NPRM* that Congress did not intend to exempt IVDS licensees from competitive bidding on the basis of their status as governmental entities or educators does not apply to UT-System's instant concern. The FCC's point is that an educator's status, in and of itself, should not be a basis for exemption, since educator's have "the ability ... to invest in other commercial ventures, such as real estate or the stock market." *Id.*<sup>1</sup> Our proposal is, rather, that the Commission look beyond institutional status to the planned use of the spectrum. Where such use is plainly educational, the applicant will fall squarely

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<sup>1</sup> This claim itself is dubious. Many public institutions of higher learning are subject to strict limitations on commercial activities, including investing.

within a class or sub-class of users whom Congress intended to exempt from the auctions process, as defined by the formula discussed above.

In sum, the FCC should clarify in this proceeding that the competitive bidding process will not apply to any future service which contains a reservation of spectrum for educational use. Beyond that, the Commission should exempt from auctions educational institutions which utilize a license for educational purposes.

Respectfully submitted,

THE UNIVERSITY OF TEXAS SYSTEM

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November 30, 1993